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In the Supreme Court of the United States

OCTOBER TERM, 1970

OLIVER T. FEIN, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 19–24) is unreported. The opinion of the court of appeals (Pet. App. 25–48) is reported at 430 F. 2d 376.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1970. On October 16, 1970, Mr. Justice Harlan extended the time to file a petition for a writ of certiorari to and including December 19, 1970, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

414-668—71

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 460(b)(3)) permits a pre-induction judicial challenge to the validity of the Selective Service appeal procedures.

STATUTE INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3), provides in relevant part:

* * * * * *

> * * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution * * *, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. * * *

STATEMENT

Petitioner, a medical doctor, was classified II–S (student deferment) while pursuing his studies and then II–A (occupational deferment) during his internship. When still classified II–A, he filed an application for a I–O (conscientious objector) classification, which was denied by his local board on the

ground that petitioner "at that time" did not qualify for I–0 status (Pet. App. 26).

In February 1968, petitioner's II–A classification expired and his local board reclassified him as I–A (available for military service). Petitioner requested and was granted a personal appearance before the local board, following which the board determined that he qualified as a conscientious objector and granted him a I–O classification (Pet. App. 26).

Pursuant to 32 C.F.R. 1626.1, the State Director of Selective Service appealed the petitioner's I–O classification to the state appeal board. Petitioner unsuccessfully sought a statement of the reasons for the appeal. The appeal board, without giving reasons, unanimously reversed the determination of the local board and reinstated petitioner in class I–A. The State Director subsequently informed petitioner that his decision to appeal the local board classification had been based on information in petitioner's selective service file (Pet. App. 26–27); the State Director had said no more to the appeal board (Pet. App. 44).

An appeal was taken from the appeal board determination to the Presidential Appeal Board, which affirmed the I–A classification made by the state appeal board without stating reasons (Pet. App. 27). Thereafter the local board ordered petitioner to report for induction (Pet. 5). Petitioner then brought this action in the United States District Court for the Southern District of New York to enjoin his induction.

The district court ruled that petitioner's action was barred by Section 10(b)(3) of the Military Selective Service Act of 1967 and accordingly granted the government's motion to dismiss the complaint (Pet. App. 19–24). The court of appeals agreed; Judge Hays, in a separate concurrence, concluded in addition that petitioner had not established the jurisdictional amount required under 28 U.S.C. 1331 (Pet. App. 32). Chief Judge Lumbard dissented; in his view, the present case is within the *Oestereich* exception to Section 10(b)(3), the 28 U.S.C. 1331 requirement is met, and the merits of petitioner's claim entitle him to the relief sought (Pet. App. 32).

ARGUMENT

1. Petitioner's suit was properly held barred by Section 10(b)(3), which precludes "judicial review * * * of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution * * *, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *." *Oestereich* v. *Selective Service Board*, 393 U.S. 233, and *Breen* v. *Selective Service Board*, 396 U.S. 460, provide no basis for a pre-induction attack on the procedures under which petitioner was ultimately denied a conscientious objector exemption. The narrowness of the limitations upon Section 10(b)(3) recognized in those cases is made clear by the Court's explanation in *Breen* (396 U.S. at 467) that—

> In both situations a draft registrant who was required by the relevant law not to be inducted

was in fact ordered to report for military service. * * *

Unlike the registrants in *Oestereich* and *Breen*, petitioner has not been denied a classification to which he is entitled as a matter of law under the Act. Like the registrant denied preinduction review in *Clark* v. *Gabriel*, 393 U.S. 256, petitioner bases his claim to exemption upon a conscientious objector submission, the consideration of which "inescapably involves a determination of fact and an exercise of judgment. * * * To allow pre-induction judicial review of such determinations would be to permit precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower' (113 Cong. Rec. 15426 (report by Senator Russell on Conference Committee action)) which Congress sought to prevent when it enacted § 10(b)(3)." *Id.* at 258–259. See *Brookout* v. *Thomas*, 430 F. 2d 1343 (C.A. 9). Cf. *Sloan* v. *Local Board No. 1, Bernalillo County, N.M.*, 414 F. 2d 125 (C.A. 10); *Stella* v. *Selective Service System of U.S. of A., Loc. Bd. No.* 66, 427 F. 2d 887 (C.A. 2); *Edwards* v. *Selective Service Local Board No. 111*, 432 F. 2d 287 (C.A. 5).

Petitioner seeks to distinguish his case on the ground that it asserts general constitutional challenges to the appeal procedures. But this does not eliminate the obstacle that he has no claim under the selective service statute, as this Court's decision in *Boyd* v. *Clark*, 393 U.S. 316, shows. In *Boyd*, four Selective Service registrants attacked Section 6(h)(1) of the Act (50 U.S.C. App. 456(h)(1)) on the ground that student deferments in general unconstitutionally dis-

criminate against registrants economically unable to attend college, and bear no reasonable relationship to the purposes of the Act. The three-judge district court to which this attack was presented dismissed the action on grounds other than Section 10(b)(3) (287 F. Supp. 561 (S.D. N.Y.)). On appeal, this Court affirmed *per curiam* on the authority of *Clark* v. *Gabriel, supra,* without reaching the other reasons for dismissal given by the district court. Since *Clark* v. *Gabriel* rested upon Section 10(b)(3), *Boyd* was a clear holding that the Section 10(b)(3) proscription may not be circumvented by framing the claim in terms of a constitutional challenge—as petitioner would do here. See also *Czepil* v. *Tarr*, No. 244, this Term, certiorari denied, October 12, 1970. Here, as in those cases, the registrant's remedy is to assert his objection to his classification, and the processing of his conscientious objector claim, by a petition for a writ of habeas corpus after induction or as a defense to a criminal action.

2. In any event, Judge Hays properly concluded in his concurrence below (Pet. App. 32) that the district court lacked jurisdiction over petitioner's complaint, because it did not meet the $10,000 jurisdictional amount requirement of 28 U.S.C. 1331. The only available grounds for federal jurisdiction in suits of this sort are the general grants of federal question and diversity jurisdiction, both of which apply only where "the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs" (28 U.S.C. 1331, 1332). *Oestereich* expressly acknowledges the ap-

plicability of the amount-in-controversy requirement; after finding that that suit was not barred by Section 10(b)(3), the Court remanded the case to afford the registrant the opportunity "to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. § 1331." 393 U.S. at 239. See also *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817, 826 (C.A. 2); *Goldsmith* v. *Sutherland,* 426 F. 2d 1395 (C.A. 6), certiorari denied, No. 579, this Term, December 14, 1970.

Congress has conditioned access to the federal courts on a litigant's ability to establish that his dispute involves a minimum monetary amount, and the federal courts may not ignore this requirement even though it may necessitate rejection by them of civil cases that otherwise bring into question significant federal rights. This is not one of those situations where Congress has made a specific determination to allow suits without any showing of jurisdictional amount, as it has in the various Civil Rights Acts and other statutes, *e.g.,* 28 U.S.C. 1337, 1339, 1340, 1343, 1344, 1346; 45 U.S.C. 51 *et seq.* (Federal Employers' Liability Act); 46 U.S.C. 688 (Jones Act). Accordingly, the plain language of Section 1331 seems clearly to preclude federal jurisdiction over petitioner's pre-induction civil action, even if Section 10(b)(3) did not, since petitioner has submitted no factual support for the allegation in his complaint that the jurisdictional amount is involved.

3. Since, for the foregoing reasons, the district court properly dismissed the complaint for lack of jurisdiction, we deem it unnecessary to discuss petitioner's

claim on the merits. We do point out, however, that petitioner, like any other registrant whose conscientious objector claim has been rejected by the Selective Service System, may assert on habeas corpus following his induction any contention he may have that there was no basis in fact for the denial of his claim; he has not asserted any such contention—properly—in this pre-induction civil suit.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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